

SC No. 86668
IN THE MISSOURI SUPREME COURT

VANCE BROTHERS, INC.
RESPONDENT

VS

OBERMILLER CONSTRUCTION SERVICES, INC.
APPELLANT

SUBSTITUTE BRIEF OF RESPONDENT

Appeal from the Circuit Court of Cass County # CV101-1045CC

On transfer from the Court of Appeals Western District No. WD 62876

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JURISDICTIONAL STATEMENT

Appellant has retained his original brief before the Court of Appeals. Respondent has elected to file a replacement brief. This court's jurisdiction is founded on a timely motion for transfer to the Supreme Court filed in this court and granted by the Court on April 26, 2005. This court is exercising its jurisdiction to resolve an issue of general interest and importance in the interpretation of § 431.180, RSMo. (2002).

STATEMENT OF FACTS

Appellant's statement of facts does not include sufficient facts fairly to inform the Court of the issues.

I. The Legal File Shows That Appellant Never Questioned the Trial Court's Authority To Award Fees.

Prior to trial, Appellant Obermiller's counsel filed Obermiller's Motion to Amend Answer and Counterclaim for Attorney's Fees. Relying on § 431.180 RSMo. (2002), the Prompt Payment Statute, Obermiller sought an award of attorney's fees in the event Obermiller became the "prevailing party." Obermiller stated to the trial court in relevant part:

1. This action arises out of a private construction contract entered into between Obermiller, a Missouri corporation, and Vance Brothers, a Missouri corporation.

9. In the event Obermiller is deemed the prevailing party on Vance's claim for nonpayment, Obermiller respectfully moves this court for leave to amend its Petition to request reimbursement of reasonable attorneys fees, with evidence of

such fees to be presented to the court post-trial as ordered by this Court.

11. In addition, this amendment is justified under Mo.R.Civ.P. Rule 55.33(b) where all the issues raised in the parties respective breach of contract actions are identical to the legal basis for establishing whether a Prompt Payment violation did or did not occur....

13. This amendment additionally does not prejudice Vance where it raises by implication Vance's equal right to demand reimbursement of Vance's legal fees if Vance is deemed the prevailing party".

(L.F. at 29-31).

Vance Brothers, Respondent here, stipulated to the timeliness of the amendment of the pleadings, (L.F. at 88) but did not agree that the statute should apply to Obermiller. *Id.* The trial court's order recorded the stipulation and permitted the amendment of the pleadings (L.F. at 88), finding that if Obermiller prevailed, it would be entitled to fees under § 431.180. (L.F. at 90).

II. Prior to Voir Dire Obermiller Stipulated to the Trial Court's Authority Under § 431.180 RSMo. (2002) to Award Attorney's Fees.

On April 1, 2003, before commencing voir dire, Appellant again stipulated to the trial court's authority under § 431.180 to determine and award attorney's fees to the prevailing party after the jury's verdict was returned. (Supplemental Transcript, April 1, 2003, p.3-4, hereafter Supp. Trans. 4-1-03 at ____).

Obermiller's counsel stated:

I think what [the Prompt Payment Act] shows is that first of all, it's within the Court's discretion as to whether or not the penalty of interest and the attorney fee award is going to be given, but the statute also clearly enables the court to use that discretion to award those fees to the prevailing party.

By stipulation, Mr. Rellihan and I agreed this issue will not be submitted to the jury, but that we will submit it to the Court after the jury's verdict comes in as to whether there were grounds for the withholding.

(Supp. Trans. 4-1-03 at 3-4).

III. At Trial Appellant Contended The Trial Court Had Authority Under § 431.180 to Award Attorney's Fees To The Prevailing Party.

On April 2, 2003, during trial, Appellant filed its “Supplemental Authority on RSMO § 431.180: Attorneys Fees and ‘Prevailing Party’ Definition.” (L.F. at 69). Appellant stated: “[T]he phrase ‘award reasonable attorney’s fees to the prevailing party’, can have only one meaning, and that is award attorney’s fees to the party deemed to have ‘prevailed.’” (L.F. at 70). Appellant argued: “[T]hus the ‘prevailing party’ standard in the statute clearly and unambiguously defines the Missouri legislature’s intent to allow award of attorney’s fees, in the court’s discretion, to either a plaintiff or a defendant ‘prevailing party.’” (L.F. at 71)

Appellant then makes the point no less than three times in the document that Obermiller, if it prevailed, would be entitled to its fees as the prevailing party. (L.F. at 69, 70 and 75).

IV. The Trial Court Recorded The Appellant’s Stipulation As To Fees

In its docket entry on April 1, 2003, the trial court noted “Court conducts pretrial hearing on Defendant’s Request for application of § 431.180 attorneys fees. Parties stipulate that Court will determine any monetary award of attorneys

[sic] fees after verdict returned.” (L.F. at 5). Later, on April 2, 2003, the trial court’s order memorialized Appellant’s stipulations, both that § 431.180 authorized the trial court to award fees, and that the court would determine those fees after the jury rendered verdicts on the claim and counterclaim. (L.F. at 88). The court accepted Appellant’s argument with regard to the prevailing party and stated “[t]he court’s interpretation of ‘prevailing party’ is consistent with other Missouri cases, which have held that ‘the party in whose favor the verdict compels a judgement [sic] is the prevailing party.’” (L.F. at 90, citations omitted).

V. Appellant Conceded That Vance Prevailed And Opposed Fees Before the Trial Court Only On The Basis of Trial Court Discretion

Obermiller lost the case. When Vance sought an award of attorney’s fees, Obermiller opposed the motion. Obermiller’s April 14, 2003 motion admitted that “[p]ursuant to the jury verdict, Vance is deemed the ‘prevailing party.’” (L.F. at 91). It noted that § 431.180 made the award of fees “clearly” discretionary with the court. (L.F. at 91). It then opposed the award on the basis of amount of fees and the fact that there was a reasonable basis to withhold payment. (Supp. Trans. of 4-25-03, at 34). Obermiller’s counsel told the trial court at the hearing:

As you recall, in chambers we did move to amend the petition. At that time Mr. Rellihan asserted that because of our position as a

Defendant, the statute by law did not apply to us and precluded us from even asking for it at the end of the trial. My brief was submitted specifically to argue the Court's discretion in being able to consider it, the award of the attorney's fees to the prevailing party. All of my motions made it clear that it is discretionary with the Court.

(Supp. Trans. of 4-25-03, at 41)

VI. Appellant Did Not Raise Any Claim of Error Regarding Lack of Authority at the Trial Court.

Appellant's Motion for New Trial is found in the Legal File at 104-113. The motion contains a statement of facts and legal argument. It contains only two allegations of error. (L.F. at 112). It does not contain specific allegations of error relating to the award of attorneys fees. *Id.* It was filed on April 24, 2003, one day before counsel took up the matter of the attorney's fees at the trial court. *Id.* It did not incorporate by reference the April 14, 2003 motion opposing fees. *Id.*

ARGUMENT

- I. THE TRIAL COURT DID NOT ERR IN AWARDING ATTORNEY'S FEES. UNDER THE CURRENT STATE OF THE PLEADINGS IN THE CASE RESPONDENT REASONABLY RELIED UPON APPELLANT'S REPRESENTATIONS AND STIPULATIONS THAT SECTION 431.180 APPLIED. THE TRIAL COURT APPROVED THE PARTIES' STIPULATION AS TO PROCEDURE. APPELLANT FAILED TO RAISE THE ISSUE IN ITS MOTION FOR NEW TRIAL OR OTHER AFTER-TRIAL PLEADINGS, AND HAS ASSERTED ITS CLAIM FOR THE FIRST TIME ON APPEAL. IT IS ESTOPPED BY RESPONDENT'S RELIANCE ON ITS STIPULATIONS AND ARGUMENTS, AND BY THE DOCTRINE OF INVITED ERROR, TO DENY THE AUTHORITY OF THE TRIAL COURT TO ENTER AN AWARD OF ATTORNEYS FEES.**

A. Standard of Review

Appellant asserts a claim that the trial court was without authority to enter an order awarding attorneys fees. With respect to Point I, that assertion is based on an analysis of the face of the petition and the applicability of § 431.180 RSMo. (2002). To the extent that the point presents a question of law, review is *de novo*. *Delta Air Lines, Inc. v. Dir. of Revenue*, 908 S.W.2d 353, 355 (Mo. banc 1995); *Smith v. Shaw*, ___ S.W.3d ___, 2005 Westlaw 844960 (Mo. banc).

However, this Court must first determine whether Appellant preserved the issue whether the trial court erred in awarding attorneys' fees for appellate review. Appellant's Point I argues that "the trial court erred in awarding attorney fees to Vance under § 431.180 RSMo. (2002) because the trial court lacked any statutory authority for entering such an award..." This argument was not preserved for appellate review by Appellant in a proper after-trial motion. Indeed, Appellant failed to raise the statutory authority argument at any time before the trial court in an after trial motion. As this Court has repeatedly held, an issue that is not presented to the trial court is not preserved for review in the appellate courts. *Busse v. White*, 287 S.W.600 (Mo. 1926).¹

¹ In *Busse* the plaintiff completely changed his theory in the Supreme Court. The court noted:

This is a court of review of supposed errors committed by the trial court. It would manifestly be improper for us to convict the trial

B. Summary of the Argument

The Court of Appeals' opinion overlooks a fundamental, statutorily-mandated rule intended by the legislature to apply to all statutes it passes. Section 1.030 RSMo. (2004) provides in relevant part that "[w]hensoever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person is included, although distributive words are not used." *Id.* That oversight permitted the Court of Appeals to conclude, incorrectly, that a contract calling for a single payment does

court of error in respect to a question upon which it was not asked to rule. Plaintiff has entirely changed his theory in this court. ... The case is before this court in the exercise of its appellate jurisdiction.

Our jurisdiction is derived through the trial court. We have no power to enter an order or judgment which the trial court did not have the power to make before the case reached us on appeal. It may be that the trial court would have been advised to grant plaintiff the very relief here asked for if plaintiff had there asked for it.

Busse, 287 S.W. at 602; See also *State ex rel Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. banc 2000) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review"); *VanBooven v. Smull*, 938 S.W.2d 324, 330 (Mo.App. W.D.1997) ("[A]n appellate court will not convict the trial court of error on an issue which was never before it to decide").

not fall within the authority granted a trial court in § 431.180 to award attorney's fees when a party fails to "make *all scheduled payments* pursuant to the *terms of the contract*." 431.180(1) RSMo. (2002).

The remainder of the Court of Appeals' opinion is generally correct. Obermiller's brief to this Court does not even address the Court of Appeals' opinion.

The Court of Appeals correctly rejected Appellant's contention that an award of attorney's fees was improper because this was an action on an account, not a contract action. The Court of Appeals noted that styling the action as one on account rather than as breach of contract "does not automatically result in the inapplicability of Section 431.180." *Vance Bros.*, Slip op at 6. The Court of Appeals reasoning is sound in this regard.

The trial court's award should be affirmed on numerous other grounds as well. Appellant's counsel, not Respondent, first raised the issue of the application of § 431.180 by filing a motion to amend the pleadings in the case so as to permit her to make a fee claim if Obermiller, appellant herein, prevailed at trial. (L.F. at 29). Until Appellant raised the issue, attorney's fees were not in the case.

Respondent opposed application of the Prompt Payment statute to Obermiller, taking the position in the trial court below that the Prompt Payment statute only permitted fees to the person for whom prompt payment was denied. The trial court sustained Appellant's arguments and ruled against Respondent on that issue. (See L.F. at 88, 90). Thereafter the parties stipulated that the court could

determine the award of fees after the prevailing party was determined. (Supp. Trans. 4-1-03 at 3-4).

Vance Brothers ultimately prevailed before the jury and sustained its burden of producing evidence of its attorney's fee and that fee's reasonableness. At the trial court, Obermiller, argued against any attorney's fee on only two grounds: (1) it suggested that the trial court exercise its discretion and refuse to award fees; and (2) it claimed the fee exceeded the bounds of reasonableness. Importantly, Obermiller never raised the issue of the trial court's statutory authority to award the fee. The trial court imposed an attorney's fee and Obermiller appealed, asserting the new contention on appeal (not set out in any prior pleading, and contradicted by its prior pleadings) that the court lacked the statutory authority to award the fee.

In response to the "lack of statutory authority" argument, Respondent has four responses.

First, because this alleged error was not included in the motion for new trial, and was never presented to the trial court, it is not preserved for appellate review and this appeal should be dismissed. Rule 78.07; *Maj Investment Corp. v. Wersching*, 612 S.W.2d 364, 365 (Mo.App.1980); *McMahon v. Charles Schulze, Inc.*, 483 S.W.2d 666, 667- 668 (Mo.App.1972).

Second, Respondent contends that Appellant is estopped by its own arguments and by the doctrine of invited error. This because a party is bound by the position it takes in the trial court, and at the trial court Obermiller represented

specifically that the judge had that statutory authority to award fees. *Scott v. Edwards Transp. Co.*, 889 S.W.2d 144, 147 (Mo. App. S.D. 1994). *Reed v. Bott*, 14 S.W. 1049 (Mo. 1889); *Harper v. Morse*, 21 S.W. 517 (Mo. 1893); *Williams v. St. Louis Public Service Co.*, 253 S.W.2d 94, 104 (Mo. banc 1952). The doctrine of invited error states that one cannot complain in an appellate court that an action of the trial court was error if he himself invited that action and acquiesced in it. *Polen v. Kansas City Chip Steak Company*, 404 S.W.2d 416, 422 (Mo. Ct. App. 1966); *Collins v. Collins*, 875 S.W.2d 643 (Mo. Ct. App. S.D. 1994) (“A party cannot lead a trial court into error and then employ the error as a source of complaint on appeal.”); *Reed v. Rope*, 817 S.W.2d 503, 509, (Mo. App. W.D. 1991); *Burke v. Moyer*, 621 S.W.2d 75, 82 (Mo. App. W.D. 1981).

Third, Respondent relied on Appellant’s stipulation that the attorney fee issue was in the case as pleaded at the trial court. Appellant cannot now claim that Respondent should have amended its pleadings or submitted on a different theory when Appellants stipulated that the current state of the pleadings was sufficient to invoke the authority of the trial court in § 431.180 to award attorney’s fees.

Fourth, even without Appellant’s stipulations and judicial admissions, Respondent’s evidence supported the existence of a contract, the failure of the Appellant to make the required payment under the contract, and the application of the statute.

C. The Trial Court Had Statutory Authority Under § 431.180 to Award Attorney’s Fees to Respondent in That A Single Payment Not Made At The Conclusion Of The Contract Constitutes A Failure To Make All Payments As Scheduled.

Appellant makes two arguments that the Trial Court lacked the statutory authority to award fees. These arguments are (1) this was an action on account and that as a result, Section 431.180 should not apply; and (2) The statute requires multiple payments, not a single payment.

1. An Action on Account Is An Action On A Breach of The Obligation of Payment of A Contract.

In Obermiller’s Motion To Amend, L.F. at 29, Obermiller states “This action *arises out of a private construction contract...*” *Id.* (emphasis supplied) And later: “In addition, this amendment is justified... where all the issues raised in *the parties respective breach of contract actions* are identical to the legal basis for establishing whether a Prompt Payment violation did or did not occur.” (L.F. at 31. *See also* L.F. at 91: “the statute clearly makes an award of attorneys fees discretionary with the court.”)(emphasis supplied).

For Appellant to now suggest that there is no basis for the claim of fees because the action was pleaded as an action on account and not a contract action goes fully against the Appellant’s trial court pleadings and representations as well as settled law. As the Court of Appeals’ opinion reasoned:

This distinction [between actions on contract and actions on account are by Appellant] ignores the common overarching principles under which each respective claim is brought. Specifically, an action on account and a breach of contract claim both require proof of offer, acceptance, and consideration. ***Welsch Furnace Co. v. Vescovo***, 805 S.W.2d 727, 728 (Mo. App. 1991) (stating that because an "action on account is an action based in contract . . . proof . . . depends upon . . . showing an offer, an acceptance, and consideration between parties as well as correctness of account and reasonableness of charges").

In this case, Vance and Obermiller initially entered into a written contract. Despite not modifying or amending the contract to reflect the correct type of surfacing to be applied, the parties still performed according to the terms of their agreement. Although this lack of formal modification may have led Vance to plead his claim as a petition on account rather than as a breach of contract, it does not automatically result in the inapplicability of Section 431.180. ***See Fru-Con/Flour Daniel Joint Venture v. Corrigan Bros., Inc.***, No. ED 82587, 2004 WL 2340690, at *6 (Mo. App. E.D. Oct. 19, 2004) (holding quantum meruit award did not preclude award of attorney fees under the Private Prompt Payment Act).

Vance Bros., Slip op at 3-4.

The Court of Appeals reasoning is sound in this regard. Section 431.180 applies in this action as the agreement between Vance and Obermiller was a contract.

2. Appellant's Argument That There Must Be

Multiple Payments Fails For § 1.030, RSMo. (2002).

Appellant attempts to construct an argument that multiple scheduled payments must be due under the contract before the statute can apply. That argument appears to be constructed on the language of the Prompt Payment statute without reference to other Missouri statutes. Section 431.180, RSMo. (2004) the statute at issue, states in applicable part:

(1) All persons who enter into a contract for private design or construction work . . . shall make *all scheduled payments* pursuant to the *terms of the contract*.

(2) Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party.

§ 431.180 (emphasis added).

Appellant's argument (and the Court of Appeals opinion) overlooks § 1.030 RSMo. (2004).

Section 1.030 provides in relevant part that “[w]hen, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person is included, although distributive words are not used.” This principle has guided construction of Missouri statutes since it was enacted.

In *State v. Villines*, 81 S.W. 212 (Mo. App. 1904) the defendant contended that a statute making it illegal to place “bets” was not violated by placing a single bet. The appellate court held otherwise, citing the predecessor to § 1.030. Similarly, in *State v. Dougherty*, 216 S.W.2d 467 (Mo. 1949) the state claimed that although the defendant provided his information to one injured party, but not to a policeman or to all the injured parties, that he was guilty of leaving the scene of an accident. In reversing, the Supreme Court said “[w]hen the information required by the statute is furnished to one injured party, it is thereby furnished to all and 'to the injured party,' without regard to their number; furnishing the information required to one within the class 'the injured party' will fully satisfy the statute and bar a conviction for failure to furnish the information to another within the same class.” *Id.* at 471.

In *State v. Plotner*, 222 S.W. 767 (Mo. 1920) the same defense attempted here – that the plural excludes the singular – failed because of the predecessor to § 1.030. In *Plotner* the defendant was charged with making false entries in

company books, and complained that he was charged only with making one false entry. The court rejected this narrow reading of the statute. It said:

Appellant makes the point that no offense was committed, because section 4653 uses the word "entries" in describing the crime, and therefore a single false entry would not be a violation of the law.

Section 8053, R. S. 1909, is as follows:

"The Singular Included under the Plural.--Whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or persons shall be deemed to be included, although distributive words may not be used."

Appellant points out that section 4653 as originally enacted contained the singular "entry," and in 1845 was amended making it plural, "entries," and argues that the amendment indicated an intention to change the meaning, and exclude the application of the act to a single entry. Section 8055, R. S. 1909, however, provides that the rules prescribed in section 8053 and section 8054 "shall apply in all cases unless it be otherwise specially provided, or unless there be something in the subject or context repugnant to such construction."

That provision excludes the possibility of a construction which would limit the operation of the word "entries," as section 8053 says

it shall *not* be limited. The construction which appellant desires to apply is not "specially provided," nor is there anything in the "subject or context" of section 4653, defining the offense, which is "repugnant to" the construction definitely required by section 8053. Section 8053 was enacted long before, and was the law at the time the amendment of section 4653 in 1845 changed the word "entry" to "entries." The Legislature must be presumed to have made the change with a full understanding of the construction which section 8053 would apply to it.

Id. at 772.

Section 1.030 controls the construction of § 431.180. The legislature intended to apply § 431.180 to both multiple and single payment contracts.

3. Appellant's Evidence Supports An Award of Fees

Under § 431.180

Respondent introduced evidence at trial of the existence of a contract between the parties. (See, *inter alia*, L.F. at 22, 23). There was evidence that Obermiller breached its obligation to make the one scheduled payment at the completion of the contract. (See Trans. at 280-84). There was evidence that Vance Brothers incurred legal fees. (L.F. at 116). All the requirements of § 431.180 were met, and Vance Brothers is entitled to payment of its legal fees.

**C. Appellant Wholly Failed to Preserve These Issues For
Appellate Review And This Court Should Dismiss This
Appeal**

It is black-letter law in Missouri that to preserve a claim for appellate review the claim of trial court error must be raised in the motion for new trial.

RULE 78.07.

Appellant's Motion for New Trial raised two claims of error. Appellant's contended that the trial court erred in:

1. Sustaining Plaintiff's Motion in Limine limiting negative inferences against Vance's late invoice amendment and evidence of correspondence between OCS and Jerry Rellihan, counsel for Vance, in September 2001;
2. Limiting and precluding evidence and testimony regarding Vance's provision of microsurface at the Topeka Expo Centre and photos showing the quality of same as compared to the poor quality of the Fort Scott application.

L.F. at 112.

In fact, at no time, in any motion before the trial court, did Appellant raise the issue of the trial court's statutory authority, at least in part because it had made such a clear record that the court had the specific authority at issue. (See L.F. 31, 71 and Supp. Trans. 4-1-03 at 3-4). Under Rule 78.07 the claim of error must be

raised in a motion for new trial to be preserved for appellate review. *Maj Investment Corp.* 612 S.W.2d 364, 365; *McMahon*, 483 S.W.2d 666, 667- 668. It was not, and the appeal here should properly be dismissed.

When the Court of Appeals analyzed this case, it concluded that the trial court had authority to award attorney's fees on when a contract called for multiple scheduled payments. Absent such multiple payments the trial court had no authority/jurisdiction to award attorneys' fees.

Those supposed "jurisdictional grounds" permitted the Court of Appeals to ignore Obermiller's failure to preserve the issue of the trial court's authority for appellate review. The Court of Appeals said: "An exception exists, however, when an appellant cites the trial court's lack of jurisdiction. The question of jurisdiction may be raised at any stage of the proceedings, even for the first time on appeal." *Vance v. Obermiller*, Mo. Ct. App. W.D. 62876, (Jan. 25, 2005), Slip op at 2.

The cases the Court of Appeals cited, however, go directly to the power of the court or agency to issue a judgment and concern subject matter jurisdiction. In *Ringeisen v. Insulation Services, Inc.*, 539 S.W.2d 621, 625-26 (Mo. App. 1976), relied upon by the Court of Appeals, the issue was the power of the Labor and Industrial Relations Commission to enter an award. The failure to raise the jurisdictional question within the proper time for commission review did not preclude judicial review where the referee lacked jurisdiction and the referee's award was considered void on its face.

Similarly, in *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 73 (Mo. banc 1982), the issue dealt directly with the jurisdiction of the Administrative Hearing Commission. The State Tax Commission alleged that the AHC was acting under an unconstitutional grant of power, and therefore lacked jurisdiction. The Tax Commission had failed to raise that issue in the Circuit Court below and asserted it for the first time on appeal. In analyzing the issue this Court said:

Subject matter jurisdiction concerns "the nature of the cause of action or the relief sought" and exists only when the tribunal "has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed." *Cantrell v. City of Caruthersville*, 359 Mo. 282, 290, 221 S.W.2d 471, 476 (1949).

See also *Weatherford v. Spiritual Christian Union Church*, 163 S.W.2d 916, 918 (Mo.1942). The defense of lack of subject matter jurisdiction may not be waived, *Sisk v. Molinaro*, 376 S.W.2d 175, 177 (Mo.1964); Rule 55.27(g)(3), and subject matter jurisdiction cannot be conferred by consent or agreement of the parties, *Simmons v. Friday*, 359 Mo. 812, 825, 224 S.W.2d 90, 98 (1949); *State ex rel. Lambert v. Flynn*, 348 Mo. 525, 532, 154 S.W.2d 52, 57 (Mo. banc 1941), by appearance or answer, *United Cemeteries Co. v. Strother*, 342 Mo. 1155, 1161, 119 S.W.2d 762, 765 (1938), or by estoppel, *Simmons*, 359 Mo. at 825, 224 S.W.2d at 98. The

lack of subject matter jurisdiction may be raised at any stage in the proceedings, even for the first time in this Court. *State v. Rogers*, 351 Mo. 321, 325, 172 S.W.2d 940, 942 (1943); *Strother*, 342 Mo. at 1161, 119 S.W.2d at 765.

State Tax Comm'n v. Admin. Hearing Comm'n, 641 S.W.2d 69, 72 (Mo. banc 1982).

Here there is no question that the trial court had jurisdiction to consider the subject matter before it. Therefore, it properly had jurisdiction to consider the issues placed before it. If it exceed its legal authority and made an error of law, that error had to be preserved for appellate review. In *Ringeisen*, 539 S.W.2d at 626 (Mo. App. 1976) the court noted:

The problem for this court's determination is whether the award of the referee was an act so beyond his jurisdiction that it is void on its face; therefore open to attack or whether the award was the result of a mistake of law and therefore final due to Insulation Services' failure to appear or make a timely application for review.

Id.

The situation is the same here. There is no question as to the jurisdiction of the trial court to enter final judgment; the parties were properly before it. The only question is one of law; did the trial court have statutory authority to enter a fee award? That question had to be preserved for appellate review in a motion for new trial to be preserved for this Court's review. RULE 78.07; *Maj Investment*

Corp., 612 S.W.2d 364, 365; *McMahon*, 483 S.W.2d 666, 667- 668. It was never raised in the motion for new trial, or for that matter, at any time before the trial court.

The appeal should be dismissed.

D. Appellant Got What It Bargained For.

At L.F. 31, Appellant, in its pre-trial motion to amend its answer and counterclaim, stated “[t]his amendment additionally does not prejudice Vance where it raises by implication Vance’s equal right to demand reimbursement of Vance’s legal fees if Vance is deemed the prevailing party” (emphasis supplied).

Similarly, it argued in its supplemental authority “thus the ‘prevailing party’ standard in the statute clearly and unambiguously defines the Missouri legislature’s [sic] intent to allow award of attorney’s fees, in the court’s discretion, to either a plaintiff or a defendant ‘prevailing party.’” (L.F. at 71) (emphasis supplied).

The parties stipulated before the trial court, with the trial court recording the stipulation in its docket entry, that the award of fees would be handled by the trial court upon determination of the prevailing party. That stipulation was advanced from Obermiller’s counsel:

I think what [the Prompt Payment Act] shows is that first of all, it’s within the Court’s discretion as to whether or not the penalty of interest and the attorney fee award is going to be give, but the statute

also clearly enables the court to use that discretion to award those fees to the prevailing party.

By stipulation, Mr. Rellihan and I agreed this issue will not be submitted to the jury, but that we will submit it to the Court after the jury's verdict comes in as to whether there were grounds for the withholding.

(Supp. Trans. 4-1-03 at 3-4).

In short, the Appellant and its counsel argued to the trial court and obtained a ruling from the trial court that the party that prevailed would be entitled to an award of attorney's fees under the statute in accord with the pleadings that controlled the case. After extracting a stipulation to that effect, and making the above argument to the trial court, Obermiller lost. Obermiller's counsel argued against a fee award, but never asserted a lack of statutory authority.

Parties are bound by the assertions they make in the trial court. If this Court accepts the argument now advanced on appeal – an argument never presented to the trial court – it will be convicting the trial court of error on an issue that the trial court never had before it. An appellate court will not, on review, convict a trial court of error on an issue that has not been put before it to decide. *Martin v. McNeill*, 957 S.W.2d 360 (Mo. App. W.D. 1997)

In *Collins v. Director of Revenue*, 691 S.W.2d 246 (Mo. banc 1985) an appellant sought to bring the issue of an arresting officer's failure to warn of

refusal to take a breathalyzer test before this Court on appeal. This court succinctly stated:

Appellant did not bring the issue to the attention of the trial court in the form of an objection to the admission of the breathalyzer results or otherwise. The appellate courts will not convict the trial court of error on an issue which was not presented to it for a decision. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 36 (Mo. banc 1982), *appeal dismissed*, 459 U.S. 1094, 103 S.Ct. 711, 74 L.Ed.2d 942 (1983).

Id. at 252.

Here Obermiller lost at trial. While it did not anticipate that end, Obermiller stipulated that the pleadings extant in the case were sufficient to invoke the trial court's authority to award attorney's fees. Respectfully, this Court should not countenance Obermiller's suggestions that the trial court erred when it gave Obermiller exactly what Obermiller said it had authority to give.

**E. The Stipulation of Appellant Created A Right of Reliance
by Respondent on the Agreed Procedure For Submitting
Attorney's Fees**

When a party enters into a stipulation, the party is normally bound by the stipulation. *Fair Mercantile Co. v. Union-May-Stern Co.*, 221 S.W.2d 751 (Mo. 1949).

In *Fair*, the parties entered into a stipulation in open court. That stipulation, like the stipulation at issue here², was accepted by the trial judge. This Court said: “Such a stipulation should be as binding as a written contract; indeed, it is a contract but made with more solemnity and with better protection to the rights of the parties than an ordinary contract made out of court.” *Id.* at 755, citing *Dittmeier v. Laughlin*, 253 S.W.2d 777, 780 (Mo. Ct. App. 1923)(“ An oral admission or agreement, made in open court for the purposes of the trial or hearing, and preserved in the record, has the same binding force and effect as a written, signed stipulation.”).

A stipulation is an agreement between counsel with respect to business before a court, and as such is under the supervision of the court. *Pierson v. Allen*, 409 S.W.2d 127, 130 (Mo.1966). Stipulations are controlling and conclusive, and courts are bound to enforce them. *Howard v. State Board of Education*, 847 S.W.2d 187, 190 (Mo. App. S.D. 1993). A stipulation should be interpreted in view of the result which the parties were attempting to accomplish. *Pierson*, 409 S.W.2d at 130. However, parties cannot stipulate to issues of law. *Kansas Ass’n of Private Investigators v. Mulvihill*, 35 S.W.3d 245 (Mo. App. W.D. 2000) (Stipulating that the agency correctly followed the Missouri Administrative Procedure Act (MAPA) was an inappropriate stipulation to matters of law, so that the trial court was free to disregard the stipulations and make a conclusion of its

² See L.F. at 5, 88.

own, as was the Court of Appeals).

Here, the stipulation was simply an alteration of trial procedure approved by the trial court. By stipulating that an award of fees to the prevailing party was an issue that was within the pleadings before the trial court, the parties were attempting to agree that an award of fees to the prevailing party would be proper. As such the stipulation cannot precisely be pigeon-holed into a stipulation of either fact or law. While generally, stipulations of litigants cannot be invoked to bind or circumscribe court in its determination of questions of law, *Howard v. Missouri State Bd. Of Educ.*, 847 S.W.2d 187 (Mo. Ct. App. S.D. 1993), courts have permitted parties to the application of a particular statute in limited circumstances. For example, in a wrongful death action the parties could stipulate that the law of the state where fatal injuries occurred was not to be applied either in its entirety or in part, and that stipulation controlled. *Snead by Snead v. Cordes by Golding*, 811 S.W.2d 391 (Mo. App. W.D. 1991)

Here the trial court found the stipulation proper when it entered its order approving a fee award to defendant Obermiller if it prevailed. (L.F. at 88). Obermiller is bound by that finding. This is because a party is bound by the position it takes in the trial court. At the trial court Obermiller represented to the court that it specifically had that statutory authority. It is bound by that admission. *Scott*, 889 S.W.2d 144, 147; *Reed*, 14 S.W. 1049; *Harper*, 21 S.W. 517; *Williams*, 253 S.W.2d 94, 104.

However, this Court does not have to determine whether the stipulation was

one of law or fact, and does not have to determine whether to enforce the stipulation because the stipulation created an issue of reliance. When the Appellant moved to amend its own pleadings, and represented that the amendment by implication granted Respondent the right to fees, it created a justifiable reliance on the part of the Respondent. Respondent was entitled to take Appellant at its word that an amendment to its pleadings to assert a claim for breach of contract, or to plead the language of the statute was unnecessary. Appellant having so relied, and having left its pleadings and submitted its in the state that Obermiller agreed was sufficient to invoke the trial court's authority to award fees to the prevailing party, this Court should enforce the effect of the stipulation.

**F. Appellant Invited The Error Now Complained Of And
Should Not Be Able To Assert It On Appeal.**

Appellant invited the trial court to rule as it did on the question of whether the § 431.180 applied. The trial court ruled as Appellant wanted. Appellant now complains that the trial court lacked statutory authority – the same authority it told the Court that it had. This is invited error. “A party cannot lead a trial court into error and then employ the error as a source of complaint on appeal.” *Collins v. Collins*, 875 S.W.2d 643 (Mo. Ct. App. S.D. 1994). A party cannot complain in an appellate court that an action of the trial court was error, if he himself invited that action and acquiesced in it. *Polen v. Kansas City Chip Steak Company*, 404 S.W.2d 416, 422 (Mo. Ct. App. 1966); *see also, Reed v. Rope*, 817 S.W.2d 503,

509, (Mo. App. W.D. 1991); *Burke v. Moyer*, 621 S.W.2d 75, 82 (Mo.App.W.D.1981).

Yet this is precisely what the Appellant is doing now. It is saying to this Court that the trial court should not have trusted it when it argued vociferously and ultimately successfully for the application of the attorney's fee statute to the prevailing party. (L.F. at 88-90) Fairness and equity require that it be bound by its agreement.

G. Conclusion

For all the reasons expressed above, this Court should affirm the trial court or dismiss the appeal.

II. APPELLANT FAILED TO PRESERVE ITS CLAIM OF ERROR WITH RESPECT TO AN AWARD OF INTEREST, NEVER ARGUED THE FAILURE TO AWARD INTEREST WAS ERROR AT THE TRIAL COURT, AND IGNORES THE PERMISSIVE RATHER THAN MANDATORY LANGUAGE OF THE STATUTE.

A. Standard Of Review

Appellant incorporates by reference the standard of review from point I, and its authorities presented therein.

B. Appellant Failed To Preserve The Claim Of Error.

At trial the court imposed prejudgment interest at 9% per annum (L.F. 120-122). It did not impose the interest penalty permitted in § 431.180. Appellant now argues that because the statute *permits* the court to award both an interest penalty and attorney's fees, the trial court's *failure to award* the additional 1.5% interest penalty deprives it of jurisdiction to award attorney's fees. (See App. Br. at 15-16, noting there that its reading "sounds picayune").

Just as the Appellant failed to preserve its claim of error with respect to statutory authority, it similarly failed to preserve any claim that the interest penalty should have been awarded in order to trigger an award of an attorney's fee.³ This claim is nowhere in the Motion for New Trial, nor is it in the memorandum opposing attorneys fees. (See L.F. at 91). Appellant incorporates by reference, as if fully set forth herein, the contents of its argument in Point I with regard to preservation of the issues and the effect of the stipulation on the reviewability of this point. This point is Appellant's argument is unreviewable and should be dismissed.

**C. The Statute Permits But Does Not Require The Award Of
An Interest Penalty**

Should this Court, *ex gratia*, decide to review this issue, it should not detain the Court for long. The language of § 431.180(2) RSMo. (2002) is clear with respect to attorney's fees:

The court may in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from

³ It makes ample sense as to why the Appellant never raised this issue before the trial court. If it had, the damage to its client in terms of an interest penalty would have magnified the attorney's fee award. So, instead, Appellant held back this argument and waited to ambush on appeal.

the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party.

Id.

The statute permits, but does not mandate, an award of interest, and the fact that the interest clause is set off from the attorney's fee clause by a comma indicates that the clauses are independent and that the court may award one, or both, or neither as the court, in its discretion, sees fit.

Missouri authorities on the interchangeability of the words 'and' and 'or' are collected in *Jones v. Haines, Hodges & Jones Bldg. & Develop. Co.*, 371 S.W.2d 342, 344(6) (Mo.App.1963); *City of St. Louis v. Consolidated Products Co.*, 185 S.W.2d 344, 346(2) (Mo.App.1945); *Ex Parte Lockhart*, 350 Mo. 1220, 171 S.W.2d 660, 666(21) (Mo. banc 1943), and *Hurley v. Eidson*, 258 S.W.2d 607 (Mo. banc 1953). In the latter case the Court said that the word 'or' in statutes is frequently interpreted to mean 'and', and this interpretation is given to it whenever required to carry out the plain purpose of the act and when to adopt the literal meaning would defeat or frustrate the purpose of the enactment, or lead to an absurd result.

Here imposing a mandate on trial courts to impose an interest penalty in order to impose an attorney's fee would convert the permissive language of the statute "[t]he court may in addition to any other award..." into mandatory language "[t]he court shall, in addition to any other award..." That would be an

absurd result where the statute is designed to convey discretion to the trial judge to impose additional remedies. Even when construing penal statutes courts construe the conjunction “and” to mean “or,” and “or” to mean “and.” *State ex rel Stinger v. Krueger, Judge*, 217 S.W. 310, 316 (Mo. banc 1919).("The conjunction 'and' will be read as 'or' and 'or' as 'and' when the sense obviously requires and this, in plain cases, even in criminal statutes against the accused." citing Bishop, Stat. Crimes (3d Ed.) p. 259.). This is such a situation.

Additionally, this position, that the statute mandates an award of interest, is not the position that the Appellant took at trial when it told the Court:

I think what [the Prompt Payment Act] shows is that first of all, it's within the Court's discretion as to whether or not the penalty of interest and the attorney fee award is going to be given, but the state also clearly enables the court to use that discretion to award those fees to the prevailing party.

(Supp. Trans. 4-1-03 at 3-4).

Appellant is bound to this position on appeal. *Scott*, 889 S.W.2d 144, 147.

**D. The Plain Language of The Statute Does Not Permit An
Inquiry Into Appellant's Good Faith**

Before the Court of Appeals and before this Court the Appellant argued its good faith in withholding, analogizing to the Missouri Public Prompt Payment Act (MPPA), § 34.057(5), RSMo. (2002).

§ 431.180, RSMo. (2004) states in applicable part:

(1) All persons who enter into a contract for private design or construction work . . . shall make *all scheduled payments* pursuant to the *terms of the contract*.

(2) Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party.

§ 431.180 (emphasis added).

As the Court of Appeals properly found, there is no good faith requirement in the plain language of § 431.180, and Appellant's argument simply fails. See, e.g., *Vance Bros.*, slip op at 7-9

CONCLUSION

Appellant failed to preserve any error for review, and there is no plain error. Appellant stipulated to the authority of the trial court to award fees, and invited any error that the trial court may have made. Having invited such error he cannot be heard to complain about it on appeal. The Appellant should be estopped from presenting an argument on appeal that contradicts the plain language of its pleadings before the trial court.

Appellant also fails to show any compelling reason to read into the statute a requirement of good faith, or an additional requirement of multiple payments in derogation of § 1.030, RSMo. (2002). Converting the permissive language of the statute into mandatory language requiring a court to award interest as a precondition of awarding attorneys fees would lead to an absurd result in a statute that was designed to convey discretion to trial court judges.

For all these reasons the Respondent respectfully requests that this court either (1) dismiss this appeal outright for failure to preserve the error; or (2) Affirm the judgment of the trial court with respect to the attorney's fees.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Rule 84.06(b) in that it contains 8,734 words. Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free. Word count was secured using Microsoft Word.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing, including a copy of the electronic version of the brief in both Microsoft Word and PDF format, were served on counsel for Appellant on this 6th Day of June, 2005, by placing the same in the US Mail, first class postage prepaid, addressed to:

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